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Supreme Court of the United States.

October Term, 1948.

ELSIE C. EMERY,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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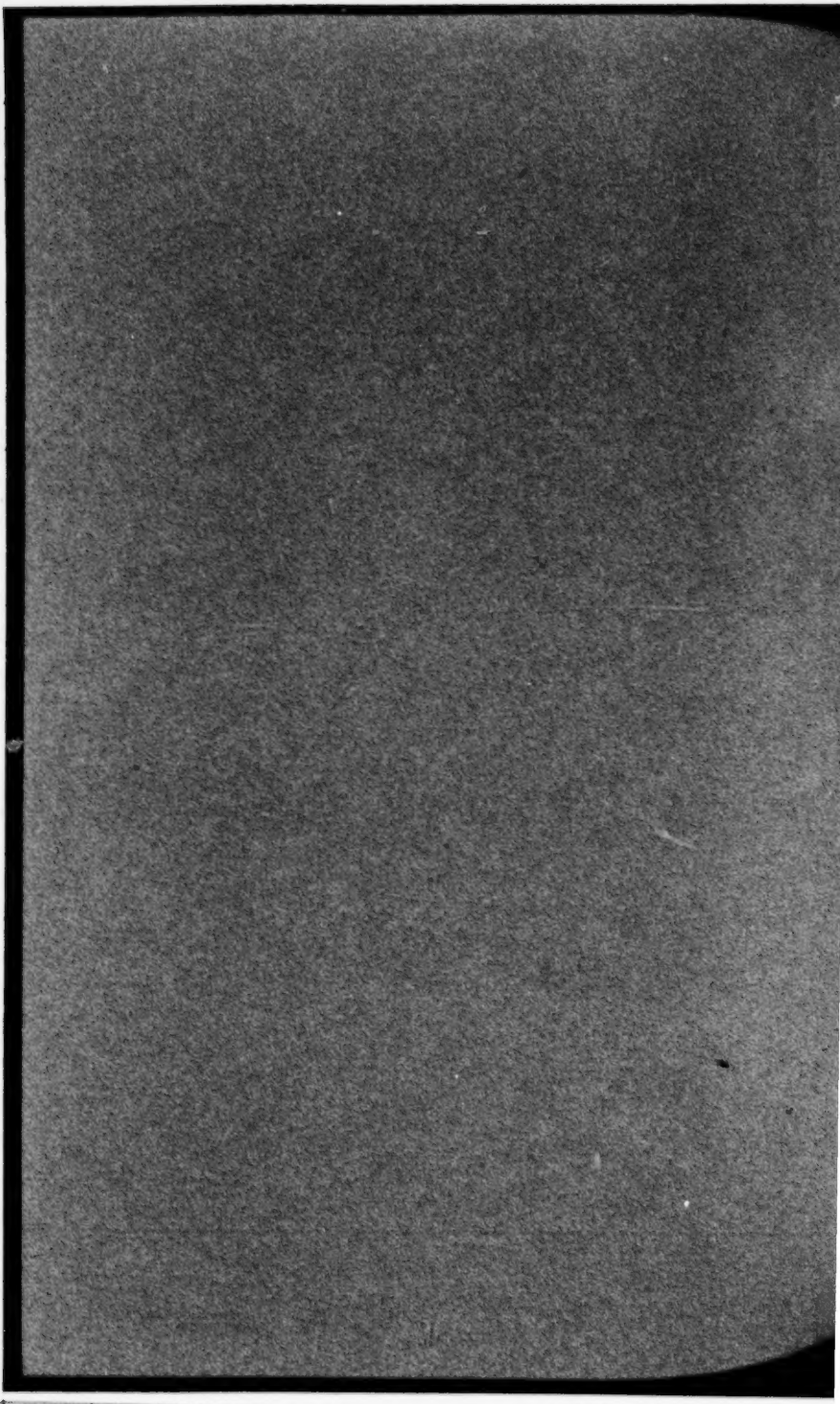

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Supreme Court of the United States.

OCTOBER TERM, 1945.

ELSIE C. EMERY,
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against
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

The petitioner by her counsel hereby prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above case on July 22, 1946, affirming the decision of The Tax Court of the United States, promulgated October 31, 1945.

Opinions Below.

The opinion of The Tax Court of the United States appears at pages 28-40, inclusive, of the Record, and may be found in 5 T.C. No. 122. The opinion of the Circuit Court

of Appeals for the First Circuit appears at pages 119-125, inclusive, of the Record, and has not as yet been reported.

Jurisdiction.

The original judgment of the Circuit Court of Appeals was entered the 22d day of July, 1946. Thereafter the petitioner sought a rehearing, and a petition for such rehearing was filed the 5th day of August, 1946, and was denied the 26th day of August, 1946. The jurisdiction of this Court is invoked under Sections 22(a), 22(b)(3), 23(o) and 162(a) of the Internal Revenue Code.

Questions Presented.

The questions presented are three in number:

1. Whether an annuity under each of five certain trusts created by the petitioner's husband, Allan C. Emery, under date of August 20, 1937, is taxable to the petitioner for the tax years 1939, 1940 and 1941.

2. Whether the sum of $10,943.62, representing the income of said trusts for the tax year 1939, in excess of the annuities paid to the petitioner during such tax year, is also taxable to the petitioner.

3. Whether the determinations made by the respondent in this case violated the petitioner's right of freedom of contract.

Statute Involved.

The pertinent provisions of Sections 22(a), 22(b)(3), 23(o) and 162(a) of the Internal Revenue Code are fully set forth in the appendix hereto attached and made a part hereof.

Statement.

On August 20, 1937, Allan C. Emery, husband of the petitioner, created five certain trusts with the Boston Safe Deposit and Trust Company as sole trustee of each trust. Paragraphs 1, 2 and 5 of each of these trusts are hereinbelow set forth. Paragraph 6, referred to in paragraph 2, is without any particular materiality.

> "1. To pay to Elsie Conant Emery, wife of the Donor, during her lifetime or for such period thereof as the accrued income and principal of this trust will permit, the sum of Three Hundred ($300.00) Dollars per month, payable monthly commencing May 15, 1938, first out of income and thereafter out of principal, if necessary.
>
> "2. Subject to the provisions of the preceding paragraph and Paragraph 6 hereof, said trust is created and organized and shall be administered exclusively for religious, charitable and educational purposes, and any and all funds of the trust estate and any and all income derived therefrom which shall be paid, applied or set aside by the Trustee pursuant to the provisions hereinafter set forth shall be used exclusively for such religious, charitable or educational purposes as may be designated by the Donor and the said Elsie Conant Emery, and the survivor of them, or, following the decease of the survivor, by a majority of the adult beneficiaries during the term of this trust; and no part thereof shall be at any time applied for or inure to the benefit of any private individual. The Trustee is expressly relieved from the duty of seeing to the use or application of funds paid by it to any person, corporation, association or institution for the purposes aforesaid.
>
> . . . . . .

"5. Should the net income from the principal of the trust fund prove insufficient at any time to meet and discharge the annuity obligation in Paragraph 1 hereof imposed, or if for any reason to be expressed at any time by the said Elsie Conant Emery, it should be her desire or wish that the trust in this indenture created be terminated, she is hereby vested with full power and authority to cancel or revoke this trust at any time in whole or in part by a writing to that effect addressed to the Trustee, and she is further vested with the power to amend or alter this trust in such manner and at such time or times as she may see fit. In the event of cancellation or revocation by the said Elsie Conant Emery, it shall be the duty of the Trustee forthwith to pay unto her the whole of the principal of the trust fund, or such part or amount thereof, as she may designate, together with any accrued and undistributed income, less the charges thereagainst, free and discharged of all trusts."

During the tax years 1939, 1940 and 1941, the tax years herein involved, the trustee paid the petitioner her annuity of $3600.00 from each of the five trusts. During the tax year 1939 the excess of income of the five trusts, over the annuities so paid the petitioner for such tax year, aggregating $10,943.62, was set aside by the corporate trustee as required of it under the terms of the trust indentures, and, pursuant to suggestions made by the petitioner, in conjunction with her said husband, the trustee paid such excess income during the tax year 1939 to religious, charitable and educational institutions, all coming within the immunity of Section 23(o) of the Internal Revenue Code. (R. p. 38.)

On four separate occasions has the petitioner exercised the power conferred upon her to amend the said trusts. These amendments, however, have largely had to do with

administrative details and were necessitated somewhat by the petitioner's son, who had been invested by her with the power to vote certain securities forming a part of the corpus of each of the trusts, entering the Service. These amendments are all a part of the Record. (R. pp. 55-75.) In none of these amendments, however, did the petitioner in any wise capture or claim any part of the corpus, nor did she in any wise enlarge or enhance her annuity. In her last amendment, dated January 21, 1944, the petitioner not only released and relinquished her right to alter or amend, cancel or revoke the trusts, but at the same time she reduced the amount which each of her children might receive from the trusts, following her decease, from $300.00 per month each to $250.00 per month each, thus enlarging the potential rights of religious, charitable and educational institutions under the several trusts.

Because of the right invested in her by each of the trusts, as they were originally drawn, to alter or amend, cancel or revoke these trusts at any time, and if cancelled in their entirety to capture both corpus and undistributed income, the respondent has determined that the petitioner is taxable for the whole of the income of these several trusts during the tax years herein involved. The excess of income over the annuities for each of the tax years 1940 and 1941 was, for some reason not explained in the record, but obviously through some error or oversight, included in the petitioner's tax return for those years as though such excess had actually been received by her, whereas in truth she was not entitled to nor did she receive a dollar thereof, and as the record reveals (p. 50), a goodly portion of such excess was actually paid to charity during each of these years, and the remainder of such income for such years was permanently set aside by the trustee under the terms of the trust indentures for distribution among and for payment to religious, charitable and educational institutions as di-

rected under the trust indentures. Having paid the taxes on the excess income for the tax years 1940 and 1941, and the petitioner now being without relief in connection therewith, liability on such excess income for said tax years is not here in question.

Specifications of Error Now Urged.

The Court of Appeals erred (*a*) in holding that the annuities paid the petitioner under the several trusts in the tax years 1939, 1940 and 1941 are taxable to her; (*b*) in holding that the whole of the income of the several trusts for the tax year 1939 is taxable to her; and (*c*) in depriving the petitioner of the right of freedom of contract by holding that under the facts in the case at bar and under the law applicable thereto the petitioner is liable for income taxes on the whole of the income from the several trusts for each of the tax years here in question merely because the petitioner was invested with the right to engage in a contract whereby she could have acquired the corpus of each of the trusts and the undistributed income therefrom, but which, in truth, she elected not to do.

Reasons for Granting the Writ.

Rule 38, Section 5, of the Rules of this Court specifies, as two of the classes of cases in which applications for writs of certiorari to a Circuit Court of Appeals will be considered, those—

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter . . . or has decided a federal question in a way probably in conflict with applicable decisions of this court . . ."

It is submitted that in the present case—

(1) The decision of the Court below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *Commissioner* v. *Giannini*, 129 F. (2d) 638, and, moreover, is also in conflict with its own decision in the case of *Plimpton* v. *Commissioner*, 135 F. (2d) 482, which case very evidently was not intended to be reversed by the decision in the instant case, for the principles laid down in the *Plimpton* case are reasserted and an attempt is made to distinguish that case from the instant one. Confusion only can result from these conflicting opinions on a transcendingly important federal question.

(2) The decision of the Appellate Court below very probably conflicts with the decisions of this Court in the following cases:

Burnet v. *Whitehouse*, 283 U.S. 148;
Helvering v. *Butterworth*, 290 U.S. 365; and its companion case—
Helvering v. *Pardee*, 290 U.S. 365;
Helvering v. *Grinnell*, 294 U.S. 153;

and with what was said by this Court both in—

Harrison v. *Schaffner*, 312 U.S. 579, and
Helvering v. *Horst*, 311 U.S. 112.

For convenience, the issues presented in this case are here restated:

1. Whether an annuity under each of five certain trusts created by the petitioner's husband, Allan C. Emery, under date of August 20, 1937, is taxable to the petitioner for the tax years 1939, 1940 and 1941.

2. Whether the sum of $10,943.62, representing the income of said trusts for the tax year 1939, in excess of the annuities paid to the petitioner during such tax year, is also taxable to the petitioner.

3. Whether the determinations made by the respondent in this case violated the petitioner's right of freedom of contract.

The Court of Appeals combined these issues into a single question in the following language:

> "This case presents the question of whether a beneficiary of a trust is taxable for the income of the trust under Sec. 22(a) of the Internal Revenue Code, when she has the power to revoke, alter or amend the trust." (R. p. 119.)

The Tax Court of the United States stated the case as follows:

> "Petitioner's principal contention is that the $18,000 paid to her under paragraph 1 of the five trusts for each of the three years in question was 'property acquired by gift' and was exempt from taxation to her under section 22(b)(3), I.R.C.; *Burnet* v. *Whitehouse*, 283 U.S. 149; and *Helvering* v. *Pardee*, 290 U. S. 365. Petitioner's next contention is that the $10,943.62 of trust income for 1939 which was reported by the fiduciary as 'set aside for religious, charitable, and educa-

> tional purposes' is not income to petitioner because of petitioner's alleged renunciation of any right to receive such income." (R. p. 37.)
>
> "The respondent contends that because of the power vested in petitioner under paragraph 5 of the trusts 'to cancel or revoke this trust at any time in whole or in part' petitioner possessed the equivalent of ownership of all the corpora of the trusts and as such owner she is taxable on all of the income therefrom after deducting all contributions to charity subject to the 15 percent limitation." (R. p. 37.)

And continued The Tax Court:

> "We would agree with both of petitioner's contentions heretofore mentioned if it were not for the power vested in petitioner under paragraph 5 of the five trusts." (R. p. 38.)

(1) CONFLICT OF THE DECISION BELOW WITH A DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND WITH A PREVIOUS DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, THE PRINCIPLES OF WHICH ARE HERE REASSERTED.

The decision of the Appellate Court very obviously conflicts with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Commissioner* v. *Giannini*, 129 F. (2d) 638 (1942). The facts there are briefly:

The taxpayer entered into a contract of employment with a corporation of which he was the chief executive. Presumably, this contract was entered into by the taxpayer of his own volition and for his own personal gain. Later he renounced the right to receive the whole of the compensation due him under his contract and "suggested" that the remainder thereof, a very substantial sum of money, be paid

to an educational institution for the creation of a foundation. The corporation carried out the suggestion. The respondent contended—

> "That actual receipt of money or property is not always necessary to constitute taxable income; that it is the 'realization' of taxable income rather than actual receipt which gives rise to the tax; that a taxpayer 'realizes' income when he directs the disposition thereof in a manner so that it reaches the object of his bounty; that in the instant case the taxpayer had a right to claim and receive the whole 5% of the corporation profit as compensation for his services; and that his waiver of that right with the suggestion that it be applied to some useful purpose was such a disposition thereof as to render the taxpayer taxable for income 'realized' in the tax year in which the suggestion is carried out" (p. 640).

The taxpayer claimed—

> "A person has the right to refuse property proffered to him, and if he does so, absolutely and unconditionally, his refusal amounts to a renunciation of the proffered property, which, legally, is an abandonment of right to the property without a transfer of such right to another" (p. 640).

Both the Board of Tax Appeals and the Appellate Court found that—

> ". . . the taxpayer did not receive the money, and that he did not direct its disposition. All that he did was to unqualifiedly refuse to accept any further compensation for his services with the suggestion that the money be used for some worth while purpose" (p. 641).

Because the income paid to the educational institution was not actually received by the taxpayer and its disposition was not actually directed by him, therefore, the Court held that he was not liable for the Commissioner's deficiency assessment.

The facts in the *Giannini* case are far less favorable to the taxpayer than are those in the case at bar. In the *Giannini* case the taxpayer was lawfully entitled to receive income for which he had contracted, and his company was lawfully entitled to make the payment. The taxpayer *had to do something to avoid the receipt of the income* in order to prevent himself from being taxed with it, and so he renounced the right to receive. In the instant case the taxpayer was never actually entitled to receive the excess income over and above her annuities during the tax years in question, nor was the trustee lawfully permitted to pay any such excess income to her. She was, however, possessed of a right to create a right under which latter the excess income would have been payable to her. This right could have been exercised only by the creation of a contract and the substitution of that contract for the one previously made by her husband. Under the Massachusetts law, so far as the same may be here applicable (cf. *Morgan* v. *Commissioner of Internal Revenue,* 309 U.S. 78), the right to alter or amend a trust is not tantamount to a general power of appointment, for the right to amend is merely a right to create a condition precedent preliminary to the exercise of a power. *Old Colony Trust Company* v. *Gardner,* 264 Mass. 68.

In distinguishing the *Giannini* case the Appellate Court below, at pages 6 and 7 of its opinion (R. p. 124), said:

> "The *Giannini* case involved a repudiation of a right to receive income in the future. In our case, the taxpayer did not, during the taxable years involved, re-

> nounce her right or release her power to obtain all the income and principle of the trust. Cf. *Frank* v. *Commissioner,* 145 Fed. (2d) 413, (CCA 3rd, 1944), distinguishing the *Giannini* case. All during the taxable years, she possessed the power to take the corpus and income for her own use."

That part of the above finding to the effect that "the taxpayer did not, during the taxable years involved, renounce her right or release her power to obtain all the income and principal of the trust," is absolutely at variance with the respondent's determination, with the decision of the Tax Court, and with another finding made by the Court below.

The Appellate Court at page 3 of its opinion found:

> "The income of the trust for that year (1939) was $28,943.62. The trustee reported the $10,943.62 was 'set aside for religious, charitable, and educational purposes' and reported the balance of $18,000 as taxable to the trust. This $18,000 was paid to the petitioner in satisfaction of the annuity. The sum set aside was apparently paid to charities in 1939."

At pages 7 and 8 of The Tax Court opinion it is stated:

> ". . . the respondent determined in the notice of deficiency that the contributions were 'actually paid' by the fiduciary."

Only the petitioner, in conjunction with her husband, could lawfully determine and suggest the charities to whom the trustee could pay the excess of income over the annuities. Your petitioner submits that by joining with her husband in making such determinations and suggestions she thereby unmistakably, unequivocally and completely renounced any

right she could possibly have had ever to receive such excess income.

The principles laid down in the *Giannini* case were adopted by The Tax Court in *Kellogg* v. *Commissioner*, 2 T.C. 1126, the facts therein being quite similar to the facts in the *Giannini* case, and the Commissioner, the respondent herein, accepted the principles of law as laid down in these two cases by giving his formal acquiescence to the *Kellogg* case.

The decision of the Court below in the instant case also is in conflict with its own opinion in the case of *Plimpton* v. *Commissioner*, 135 F. (2d) 482 (1943), the principles of which latter case are again reasserted and an attempt made to distinguish the case from the instant one.

In the *Plimpton* case the taxpayer was a beneficiary-trustee. He had a corporate co-trustee which was "amenable" to his desires. The trustees were invested with the discretionary power of paying to Plimpton additional income upon his request. He had merely to make the request, or, indeed, draw himself a check for the additional income, in order to constitute the exercise of the discretion vested in him as one of the trustees, and his co-trustee would have been "amenable." The taxpayer in the case at bar was without any such power. She had the right to create new estates in the law to entitle her to receive the income. She was obliged to substitute her contract for her husband's, whereas Plimpton could receive the additional income without making a single change in the trust indenture. The petitioner therefore contends that the *Plimpton* case amply supports her contentions in the instant case.

(2) PROBABLE CONFLICT OF THE DECISION BELOW WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the Appellate Court below in the case at bar unmistakably conflicts with applicable decisions of this Court. See—

Burnet v. *Whitehouse,* 283 U.S. 148;
Helvering v. *Butterworth,* 290 U.S. 365; and its companion case—
Helvering v. *Pardee,* 290 U.S. 365;
Helvering v. *Grinnell,* 294 U.S. 153;

and with what was said by this Court both in—

Harrison v. *Schaffner,* 312 U.S. 579, and
Helvering v. *Horst,* 311 U.S. 112.

A. In *Burnet* v. *Whitehouse, supra, Helvering* v. *Butterworth, supra,* and *Helvering* v. *Pardee, supra,* this Court expressly held that an annuity payable whether or no and at all events, and out of principal if need be, was in the nature of a legacy or gift and hence not taxable as income. By paragraph 1 of each of the trusts in question the taxpayer was entitled to receive her annuities whether or no and at all events and out of principal if need be. Because the petitioner could have engaged in a contract under which the sums paid her as annuities would have been received by her in the form of taxable income, consequently the respondent holds that, under the law, it was obligatory upon the taxpayer to make such a contract or else be taxed on the assumption that she had constructively engaged in such a contract. Such contention on the part of the respondent is certainly without warrant in the law.

In *Helvering* v. *Grinnell, supra,* an estate tax case to be sure, but definitely in point because of its direct analogy,

this Court had posed before it the very question which constitutes the principal issue in this case. There the facts in a few words were these:

A decedent had bequeathed or devised a life estate to his widow with a general testamentary power of appointment, and in the event of her failure to exercise such power the property covered thereby was to descend to a specified group. The widow by her will appointed the property to the very group who would have received it under the previous testator's will had she failed in the exercise of such power. The respondent asserted that, because the widow had made a will and appointed the property thereunder, therefore the property *passed* under the power and so was subject to an additional set of estate taxes. At page 157 this Court said:

> "His [the appointee's] consent is necessary before the attempt to exercise the power becomes binding upon him the same as consent is necessary in making a contract or agreement."

In short, this Court there held in unequivocal terms that it was not the mere existence of a right, nor indeed the attempted exercise of such right, which imposed liability, but rather the effective exercise of such right. This case is absolutely decisive, as your petitioner contends, of the principal issue in the case at bar.

Again, and as was said by this Court in *Helvering* v. *Horst*, 311 U.S. 112, at page 118:

> "The power to dispose of income is the equivalent of ownership of it. The exercise of that power to procure the payment of income to another is the enjoyment . . ." and the realization for tax purposes.

And still again, in *Harrison* v. *Schaffner*, 312 U.S. 579, at pages 580-582, this Court said:

> "Decision in these cases was rested on the principle that the power to dispose of income is the equivalent of ownership of it and *that the exercise of the power* to procure its payment to another, whether to pay a debt or to make a gift, *is within the reach of the statute taxing income 'derived from any source whatever.'*
>
> ". . . It was for that reason that in each of those cases it was held that one vested with the right to receive income did not escape the tax by any kind of anticipatory arrangement, however skillfully devised, by which he procures payment of it to another, *since, by the exercise of his power to command the income,* he enjoys the benefit of the income on which *the tax is laid.*" (Italics supplied.)

Obviously none of these cases invested in the respondent the power to determine the contracts one should or could make, their scope or extent, and the taxable gain which should or could be realized thereunder, for the purpose of enabling him to impose a tax thereon. The petitioner respectfully submits that no bureaucracy was ever invested with such a limitless power.

B. The Appellate Tax Court below predicated its decision very largely upon the decisions of this Court in the cases of *Corliss* v. *Bowers,* 281 U.S. 376, and *Helvering* v. *Stuart,* 317 U.S. 154.

In *Corliss* v. *Bowers, supra,* the facts briefly were these:

The grantor of a trust appointed the income therefrom to his wife for her life but reserved to himself the power to

cancel the trust at any time and to recapture the corpus. This Court's ultimate concern, as there expressed, was to "protect the power of Congress to prevent escape from taxes or surtaxes by devices that easily might be applied to that end." It would certainly seem a far cry from a "device" for the avoidance of taxes to a philanthropic trust with the income thereon payable to charity, subject only to a primary annuity, and to the possible power vested in the taxpayer under paragraph 5 of each of said trusts. That the taxpayer had a profound regard for and fully respected her husband's philanthropic desires, and was no less philanthropic herself, is evidenced by the fact that in the tax year 1939 the whole of the income from the trusts in excess of the annuities, to wit, $10,943.62, was paid to charities, all of a character coming within the immunity of Section 23(o) of the Internal Revenue Code, and all income for the tax years 1940 and 1941 from said trusts, in excess of the annuities, amounting to $7837.53 and $26,177.01 respectively, was either permanently set aside for or actually paid to charities during said tax years. (R. pp. 35-36.) The petitioner submits that it cannot fairly be contended that there is any analogy between the case at bar and *Corliss* v. *Bowers, supra,* and *Helvering* v. *Stuart, supra.*

The decision of this Court in *Helvering* v. *Stuart, supra,* was posited chiefly upon the *Corliss* v. *Bowers* case. Briefly, the facts in *Helvering* v. *Stuart,* here material, are that the grantor of the trust was empowered to use income of the trust in discharge of paternal obligations in the care, maintenance and support of minor children. The trustee did not make use of the income in the manner he was permitted to do. At pages 170-171 this Court said:

> ". . . the possibility of the use of income to relieve the grantor, pro tanto, of his parental obligation is sufficient to bring the entire income of these trusts for

minors within the rule of attribution laid down in *Douglas* v. *Willcuts.*"

It was the decision in the *Helvering* v. *Stuart* case which gave rise to the amendment to Section 167 of the Internal Revenue Code in the Revenue Act of 1943, at which time Congress enacted Section 167(c), which is as follows:

"Sec. 167(c). . . .

"(c) Income of a trust shall not be considered taxable to the grantor under subsection (a) or any other provision of this chapter merely because such income, in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee, may be applied or distributed for the support or maintenance of a beneficiary whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed. In cases where the amounts so applied or distributed are paid out of corpus or out of other than income for the taxable year, such amounts shall be considered paid out of income to the extent of the income of the trust for such taxable year which is not paid, credited, or to be distributed under section 162 and which is not otherwise taxable to the grantor."

Here Congress declared its intent and expressly declared that "Income of a trust shall not be considered taxable to the grantor under subsection (a) *or any other provision of this chapter merely because*" such income might be made available to the taxpayer either through his own act or through a discretionary act or power of another. (Italics supplied.) It is only when income from a trust is actually distributed to a beneficiary or applied for his benefit or economic gain that the income so distributed or applied

shall be taxable. Simpler, more forceful and more direct language than that here employed by Congress would be hard to find. By Congressional enactment we are told in perfectly unequivocal terms that one is to be taxed with trust income only when such income is actually distributed to him or is economically applied for his benefit. Interpretative of this contention and in line with it is the recently decided case of *Loew* v. *Commissioner,* promulgated July 12, 1946, 7 T.C. No. 43. It is to be assumed that the Court below overlooked the Congressional amendment in the Amendatory Revenue Act of 1943 when it advanced *Helvering* v. *Stuart, supra,* and, to a more limited extent, perhaps, also *Corliss* v. *Bowers, supra,* as authoritative cases.

The fact that this Court had also placed its qualifications on the broad scope sometimes accorded *Corliss* v. *Bowers, supra,* because of the generality of the language therein employed, likely enough was also overlooked by the Court below. See *Helvering* v. *Grinnell, supra; Helvering* v. *Horst, supra; Harrison* v. *Schaffner, supra.* While the facts in these three latter cases differ quite materially from those in the case at bar, yet in the application of principles they are well in point as above set forth.

C. Among other authoritative cases upon which the Appellate Court below also relied are—

Helvering v. *Clifford,* 309 U.S. 331 (1940);
Helvering v. *Eubank,* 311 U.S. 122 (1940);
Jergens v. *Commissioner,* 136 F. (2d) 497 (C.C.A. 5) (1943);
Richardson v. *Commissioner,* 121 F. (2d) 1 (C.C.A. 2) (1941), and other cases.

In every one of the cases just above specifically enumerated the question of good faith was raised. The validity

of the transfers was questioned. They were claimed to be shams and devices, and in *Helvering* v. *Clifford* this Court said, in substance, that a completed transfer was never intended. The validity underlying the transfer in the instant case is acknowledged, or at least it is not in question, nor are the *bona fides* of the transaction doubted.

Your petitioner submits that the distinction between the good and the bad is still to be observed and preserved, especially in the law.

D. Another group of cases advanced by the Appellate Court below as authoritative in the case at bar are the cases of *Mallinckrodt* v. *Nunan*, 146 F. (2d) 1 (C.C.A. 8) (1945), and *Ella E. Russell*, 45 B.T.A. 397. In each of these cases the trustee-beneficiary (the taxpayer) had the absolute and unequivocal right to request and receive income additional to that specifically provided for such taxpayer to the extent, indeed, of the whole of the income of the trust if desired. A simple request would have provided either of these taxpayers with the additional income from their trusts and to the full amount thereof if wanted. No alteration or change in the trust indenture, nor the creation of any new estate or estates in the law, was at all necessary to enable this right to be exercised. Without again repeating the limitations upon the taxpayer in the case at bar, can it possibly be said that there is any real analogy between the *Mallinckrodt* v. *Nunan* case, *supra*, and the *Ella E. Russell* case, *supra*, and the instant case?

E. Your petitioner submits—

1. The contentions of the respondent as here laid down, if upheld, would constitute the undoing of the law as laid down throughout centuries, both by legislative bodies as well as by judicial edict. Can it be said that Congress ever

intended that a man desiring to provide protection for his wife might not employ some elasticity in the accomplishment of his purpose, for certainly economic cycles do arise from time to time, and, as they occur, they reveal to us all that tremendous fluctuations in values also occur and oft-times with a great diminution in such values? Without the exercise of some elasticity, any attempt at adequate protection might well prove an abortive effort. The petitioner submits that it was to provide relief against the rigors and penalties of the law that equity was long ago devised.

2. Again, the petitioner submits that Congress intended that organized charities should be advantaged and not disadvantaged by the provisions of the Internal Revenue Code as from time to time amended. The very provisions of Sections 23(o) and 162(a) of the Code would gainsay anything to the contrary. Obviously, if every income dollar should first have to go through a private pocket, with a tax thereon, before any part of it could find its way into charity, clearly charity would be placed at a distinct disadvantage.

3. And still again, it is most unthinkable that Congress ever intended to place in the hands of any bureaucracy the right to determine the contracts one should or could make and the benefits one might or could receive thereunder, constructively or otherwise, for, no less obviously, every contract made in this land, or so constructively made under the respondent's regulations, would be reviewable and revisable by the respondent for tax purposes.

Conclusion.

The petitioner, therefore, submits that the petition for certiorari should be granted (*a*) because the questions involved in this case are ones on which the Lower Courts are definitely in conflict; (*b*) because of the possible conflict

with the decisions of this Court; and (*c*) because the issues herein involved present a most important question of federal law which has not been but should be settled by a decision of this Court.

Respectfully submitted,

ROBERT A. B. COOK,
Counsel for Petitioner.

Of Counsel:
PHIPPS, DURGIN & COOK.

Appendix.

Statute Involved.

The pertinent provisions of Sections 22(a), 22(b)(3), 23(o) and 162(a) of the Internal Revenue Code are as follows:

"Sec. 22. Gross Income.

"(a) *General Definition.* 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

"Sec. 22. Gross Income.

. . . . . .

"(b) *Exclusions from Gross Income.* The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

. . . . . .

"(3) Gifts, bequests, and devises. The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);"

(*Note:* This section was amended by the Amendatory Revenue Act of October 15, 1942, but by the express pro-

visions of the amendment, with an exception not here material, its application was limited "to taxable years beginning after December 31, 1941.")

"Sec. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

. . . . . .

"(o) *Charitable and Other Contributions.* In the case of an individual, contributions or gifts payment of which is made within the taxable year to or for the use of:

"(1) The United States, any State, Territory, or any political subdivision thereof or the District of Columbia, or any possession of the United States, for exclusively public purposes;

"(2) A corporation, trust, or community chest, fund, or foundation, created or organized in the United States or in any possession thereof or under the law of the United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

. . . . . .

"(5) a domestic fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational

purposes, or for the prevention of cruelty to children or animals;

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary."

(*Note:* The foregoing section was amended by the Amendatory Revenue Acts of 1942 and 1944, but these amendments have no application to the tax years herein involved.)

"Sec. 162. NET INCOME.

. . . . . .

"(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (*o*)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (*o*), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;"

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 555

ELSIE C. EMERY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 28–40) is reported in 5 T. C. 1006. The opinion of the circuit court of appeals (R. 119–124) is reported ported in 156 F. 2d 728.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 22, 1946 (R. 124). A petition for rehearing, filed on August 5, 1946, was denied on August 26, 1946 (R. 124). The petition for a writ of certiorari was filed on September 30, 1946. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the entire income of certain trusts created by her husband in 1937 is includible in the gross income of the taxpayer for the years 1939, 1940 and 1941, under Section 22 (a) of the Internal Revenue Code, where the taxpayer possessed the power to alter, amend or cancel the trusts at any time and thereby to receive the whole or any part of the principal of the trusts and undistributed income, free of all trusts.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 13–15.

STATEMENT

The facts as stipulated (R. 53–115) and as found by the Tax Court (R. 30–36) may be summarized as follows:

Taxpayer is the wife of Allan C. Emery, and resides with her husband in Weymouth, Massachusetts. Her individual income tax returns for the calendar years 1939, 1940 and 1941 were filed with the Collector for the District of Massachusetts. (R. 30.)

On August 20, 1937, Allan C. Emery created five trusts, with the Boston Safe Deposit and Trust Company as the trustee. He retained no reversionary interest in the trusts and had no

power to alter, amend, or revoke. (R. 30–31, 55–61.)

Under each of the trusts, the taxpayer was to receive during her lifetime $300 a month, payable first out of income and thereafter out of principal, if necessary. The balance of the net income was payable to such religious, charitable or educational institutions or associations as the settlor and the taxpayer might designate.

Paragraph five of the trust instruments provided (R. 32, 58):

> 5. Should the net income from the principal of the trust fund prove insufficient at any time to meet and discharge the annuity obligation in Paragraph 1 hereof imposed, or if for any reason to be expressed at any time by the said Elsie Conant Emery, it should be her desire or wish that the trust in this indenture created be terminated, she is hereby vested with full power and authority to cancel or revoke this trust at any time in whole or in part by a writing to that effect addressed to the Trustee, and she is further vested with the power to amend or alter this trust in such manner and at such time or times as she may see fit. In the event of cancellation or revocation by the said Elsie Conant Emery, it shall be the duty of the Trustee forthwith to pay unto her the whole of the principal of the trust fund, or such part or amount thereof, as she may designate, together with any accrued and undistributed income, less

> the charges there against, free and discharged of all trusts.

In the event of the decease of the taxpayer without having exercised the full power of revocation or cancellation, given to her in paragraph five of the trust instruments, provision was made for further disposition of the remaining trust funds (R. 31–33).

Amendments to each of the trusts were made by the taxpayer in 1937, 1939, 1942, and 1944 (R. 31, 34, 62–75). By the amendment in 1944, the taxpayer released all power which she had to amend, alter, or revoke the trusts (R. 34, 75).

The total income of the five trusts for 1939 was $28,943.62, before any deduction for any distribution to beneficiaries. Of that amount, $10,943.62 was reported by the fiduciary as set aside for religious, charitable, and educational purposes and $18,000 was reported as taxable to the fiduciary. (R. 34.)

Taxpayer did not report in her return for the year 1939 any income as having been received from any of the five trusts. The Commissioner increased the income reported by adding thereto the above-mentioned amount of $28,943.62, representing the total income of the five trusts for 1939, and decreased the income thus determined by allowing an additional deduction for contributions of $4,341.55, applying the 15 percent limitation with respect to such contributions. (R. 34.)

The taxable income of the five trusts for 1940 was $25,837.52 before any deduction for any distribution to beneficiaries. The five fiduciary returns show a total of $7,837.52 as the amount distributable to beneficiaries, and a total of $18,000 as the net income (taxable to fiduciary). The individual income tax return filed by taxpayer for 1940 reported $7,837.53,[1] as received by her from the five trusts but the return did not include any portion (except apparently one cent) of the $18,000. The Commissioner increased the income reported by adding thereto the amount of $17,999.99, representing the difference between the above-mentioned amounts of $25,837.52 and $7,837.53. The Commissioner also allowed taxpayer an additional deduction for contributions in 1940 of $2,457.06. (R. 35.)

For the year 1940, the trustee of the five trusts paid taxpayer a total of $18,000 from the five trusts and made contributions to different organizations from the five trusts in the total amount of $1,075. The balance of the net income of the five trusts for the year 1940 was accumulated. (R. 35.)

The total income of the five trusts for 1941 was $44,949.46 before any deduction for any dis-

[1] This amount and the $26,177.01, similarly described for 1941 (see *infra*, p. 6), was, for some reason not explained in the record, thus reported, although taxpayer did not, in fact, receive it (R. 50). She makes no claim here with reference to these amounts. See Pet. 5–6.

tribution to beneficiaries. The five fiduciary returns show a total of $26,177.01, as the amount distributable to beneficiaries, and a total of $18,772.45 as the net income (taxable to fiduciary). The individual income tax return filed by taxpayer for 1941 reported $26,177.01 as received by her from the five trusts but did not include any portion of the $18,772.45. The Commissioner increased the income reported by adding thereto the amount of $18,772.45,[2] representing the difference between the above-mentioned amounts of $44,949.46 and $26,177.01. The Commissioner also allowed taxpayer an additional deduction for contributions in 1941 of $224.38. (R. 35–36.)

For the year 1941, the trustee of the five trusts paid taxpayer a total of $18,000 from the five trusts and made contributions to different organizations from the five trusts in the total amount of $2,455. The balance of the net income of the five trusts for the year 1941 was accumulated. (R. 36.)

Taxpayer's individual income tax returns for the years 1939, 1940 and 1941, were prepared on the basis of cash receipts and disbursements (R. 36).

Except for minor adjustments which are not involved on this appeal, the deficiencies in income tax asserted against the taxpayer are due to the Commissioner's determination that the net in-

[2] This amount of $18,772.45 includes $2.45 of a net long-term capital loss adjustment of $3.73 which is not involved on this appeal.

come as disclosed by the taxpayer's returns for the years 1939, 1940 and 1941 should be increased on account of "income from fiduciaries" of $28,943.62, $17,999.99 and $18,770, respectively. The Commissioner's determination that the entire income of the five trusts created by taxpayer's husband was taxable to the taxpayer was based upon the ground that the taxpayer had the power to amend or alter the trusts in such manner and at such time or times as she might see fit, and the power to cancel or revoke the trusts at any time or times in whole or in part and thereby to receive in her own right the principal of the trusts. (R. 12, 14, 29.) The Tax Court and the court below agreed with the Commissioner that the powers thus vested in the taxpayer required that the income of the trusts should be taxed to her under Section 22 (a) of the Internal Revenue Code. (R. 38–40, 119–124.)

ARGUMENT

1. The decision of the court below is in accord with a great wealth of authority in this Court, the circuit courts of appeals and the Tax Court. See *Helvering* v. *Clifford,* 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112; *Harrison* v. *Schaffner,* 312 U. S. 579; *Corliss* v. *Bowers,* 281 U. S. 376; *Richardson* v. *Commissioner,* 121 F. 2d 1 (C. C. A. 2d), certiorari denied, 314 U. S. 684, rehearing denied, 314 U. S. 714; *Jergens* v. *Commissioner,* 136 F. 2d 497 (C. C. A. 5th), certiorari denied,

320 U. S. 784; *Mallinckrodt* v. *Nunan,* 146 F. 2d 1 (C. C. A. 8th), certiorari denied, 324 U. S. 871, rehearing denied, 325 U. S. 892; *Frank* v. *Commissioner,* 145 F. 2d 413 (C. C. A. 3d); *Russell* v. *Commissioner,* 45 B. T. A. 397. See also *Richardson* v. *Commissioner,* 151 F. 2d 102 (C. C. A. 2d), certiorari denied, 326 U. S. 796.

The contentions made by the taxpayer in the petition for certiorari bear a marked similarity to the contentions advanced in the petitions for certiorari in the *Jergens, Mallinckrodt* and *Richardson* cases, *supra.* Since the denial of certiorari in those cases, nothing has occurred which would call for a review by this Court in the present case of the now well-settled principles which control here.

In the *Jergens* petition, as in the present petition (Pet. 7, 9–12), conflict was alleged with the decision of the Ninth Circuit Court of Appeals in *Commissioner* v. *Giannini,* 129 F. 2d 638. In the *Giannini* case a corporation had passed a resolution to pay the taxpayer there involved certain compensation for his services to the corporation, but the Board of Tax Appeals found that the taxpayer did not receive the money and did not direct its disposition when the corporation subsequently used the money to establish a Foundation of Agricultural Economics at the University of California. The circuit court of appeals rejected the Commissioner's contention that there was insufficient evidence to support the Board's finding

that the taxpayer had not directed the disposition of the money, stating (p. 641) that all the taxpayer did was to refuse unqualifiedly to accept any further compensation with the suggestion that the money be used for some worth while purpose. Indeed, it is doubtful that the court even passed upon the question whether a waiver of compensation, with nothing more, is such an exercise of dominion over the moneys to be received as to render them taxable, for, as pointed out in the footnote at page 641 of the opinion, the year in which the taxpayer renounced any further compensation was not before the court. But if it be assumed that the court did hold that a renunciation of a right to receive compensation for personal services would not result in the realization of income, that question is far removed from the question here presented.

In the present case, the income was derived from property. This property was subject to the complete and unfettered control of the taxpayer to do with as she might please. The only act required of her to secure the entire principal and income of the trusts in her own right, discharged of all trusts, was to address a writing to the trustee cancelling the trusts. Or, by alteration or amendment of the trusts, she could have directed the principal and income to be disposed of in any manner that might suit her fancy. The taxpayer accepted these incidents of ownership of the principal and income of the trusts and continued to

enjoy them during all of the taxable years, and it was not until the year 1944 that she divested herself of these rights. As stated by the court below (R. 122), a person could have a more unrestricted control of property only by having outright title and the act required to give the taxpayer outright title was so negligible that her position cannot be treated any differently from that of an outright owner.

The earlier decision of the court below in the case of *Plimpton* v. *Commissioner,* 135 F. 2d 482, which the taxpayer alleges (Pet. 7, 13) to be in conflict with that court's present decision is sufficiently distinguished in the court's opinion (R. 124).

2. The cases of *Burnet* v. *Whitehouse,* 283 U. S. 148, and *Helvering* v. *Pardee,* 290 U. S. 365, relied upon by the taxpayer (Pet. 14–15), are not inconsistent with the decision below. Those cases involved annuities which were a charge against principal as well as income, but the annuitants had no such powers as were possessed by the taxpayer in this case. The holding there was that the annuities were gifts and that the periodical payments were not a distribution of income but a discharge of the gifts and, as such, not taxable as income. Here the holding is that the taxpayer acquired substantial ownership of the entire principal of the trusts. Such principal constituted the gift to the taxpayer. While Section 22 (b)

(3) of the Internal Revenue Code (Appendix, *infra,* p. 13) provides that the value of property acquired by gift shall not be included in gross income, it further provides that the income from such property shall be included in gross income. The entire income from the trusts is taxed to the taxpayer, not because of her actual receipt of a portion of it, namely the $300 monthly payment from each of the trusts, but because of her substantial ownership of the entire principal of the trusts, which was the source of the income, and because of the complete control possessed by her over all of the income. The circumstance that she was to be paid a portion of the income under the trusts as they were originally drawn does not derogate from her complete control of the whole.

The case of *Helvering* v. *Grinnell,* 294 U. S. 153, cited by the taxpayer (Pet. 14–15), involved an estate tax statute, which, in its then form, required that property "pass" under the exercise of a general power of appointment to be included in the decedent's estate. That case is irrelevant to the question here. And Section 167 (c) of the Internal Revenue Code, referred to by the taxpayer (Pet. 18–19), was added by the Revenue Act of 1943, Sec. 134, 58 Stat. 51, was not made generally retroactive, and applies, moreover, only to amounts distributable in satisfaction of a legal obligation to support or maintain.

CONCLUSION

The decision below is correct; there is no conflict of decisions; and there is no occasion for further review.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
J. LOUIS MONARCH,
LEE A. JACKSON,
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OCTOBER 1946.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * *

(26 U. S. C. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(o) *Charitable and Other Contributions.*—In the case of an individual, con-

tributions or gifts payment of which is made within the taxable year to or for the use of:

* * * * *

(2) a domestic corporation, or domestic trust, or domestic community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary.

* * * * *

(26 U. S. C. 23.)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or perma-

nently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

* * * * *

(26 U. S. C. 162.)

U. S. GOVERNMENT PRINTING OFFICE: 1946